September 22, 2016

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

VIA ELECTRONIC FILING

Re: Ex Parte Presentation, Protecting the Privacy of Customer Broadband and Other Telecommunications Services, WC Docket No. 16-106.

Dear Ms. Dortch:

On September 20, the listed advocates (Christine Hines of National Association of Consumer Advocates; Paul Bland of Public Justice; Dallas Harris of Public Knowledge; Zoe Oreck of American Association for Justice; and George Slover of Consumers Union) met with Dan Kahn, Melissa Kirkel, Sherwin Siy, and David Brody of the Competition Policy Division of the Wireline Competition Bureau.

The advocates shared their views on the provisions in the broadband privacy rulemaking concerning dispute resolution.[1] Specifically, the advocates agreed with the commission's stated concerns in its rulemaking on predispute binding mandatory (forced) arbitration. Forced arbitration clauses and class action bans unfairly restrict consumers' ability to seek redress when harmed by telecommunications practices, including unfair conduct that potentially violate their privacy rights.[2] As we did in our original submitted comments to the rulemaking, the advocates called for the commission to exercise its authority to bar broadband providers' use of forced arbitration clauses and class action bans in their customer contracts. All telecommunications customers must have the right to choose how to resolve disputes with powerful providers, *after* the dispute arises.

Prior telecommunications cases show how forced arbitration blocks customers' access to remedies.[3]

For too long, telecommunications corporations, including broadband providers, have used restrictive terms in their fine print contracts to deny their customers of the ability to band together in class actions, and to require arbitration on an individual basis. For more than a

[1] Documents filed as part of this ex parte letter: Concepcion Amicus Brief; Citation: Department of Education Proposed Rule Prohibiting Use of Pre-Dispute Arbitration Agreements By Colleges Participating in Federal Direct Loan Program; The FCC Has Clear Legal Authority to Restrict Forced Arbitration; The Tide is Turning Against Forced Arbitration - A Summary of Recent Agency Action on Forced Arbitration.

[2] See, e.g., Comments of National Association of Consumer Advocates, et al. (WC Docket No. 16-106), at 7, citing *Mortensen v. Bresnan Communs., LLC*, 722 F.3d 1151, 1153, (9th Cir. 2013), https://ecfsapi.fcc.gov/file/60002065044.pdf.

[3] See, *Brief of Amici Curiae MaryGrace Coneff, et al., in Support of Respondents, AT&T Mobility, LLC v. Concepcion*, No. 09-893, Oct. 6, 2010, (attached).

decade, broadband providers and telecommunications companies generally, have sought to use class actions to evade liability under state and federal consumer protection laws.

Before the U.S. Supreme Court decision in *AT&T Mobility v. Concepcion*, courts applying state laws across the country had held that class action bans in contracts are exculpatory. Indeed, in one case, an AT&T company stipulated that class action bans are sometimes exculpatory.[4] In another case against AT&T, the district court found that few customers brought individual arbitration claims against the corporation, and the total economic impact of those disputes on the company is "infinitesimal."[5] It is clear from the examination and analysis of forced arbitration clauses in these and other court decisions that class action bans shield companies from liability and block customers' access to remedies.

CFPB study and findings provide strong evidence that forced arbitration harms.
The Consumer Financial Protection Bureau conducted a wide-reaching and thorough three-year examination on the use of forced arbitration in the consumer financial services sector.[6] The study data and agency findings are a strong indicator of how forced arbitration impacts customers in telecommunications, including for broadband privacy claims. For example:

• The CFPB data revealed that very few consumers can vindicate their rights in arbitration on an individual basis, especially for small-dollar losses. In its study, the CFPB identified only on average about 8 cases per year involving a debt dispute of $1,000 or less,[7] and only about 25 cases per year involving an affirmative consumer claim of $1,000 or less.[8]

•Based on data from its consumer telephone survey, the CFPB concluded that consumers are not aware of and do not understand the impact of arbitration clauses. Consumers are unaware of whether their credit card contracts include arbitration clauses. Consumers' beliefs about dispute resolution rights bears little to no relation to the actual contract terms. Despite provisions that restrict their rights, most believe that they can sue in court for wrongdoing and participate in class actions. Fewer than 7 percent recognized that they could not sue their credit card company in court.[9]

• The CFPB also found no evidence that arbitration clauses led to lower prices for consumers, as corporate representatives often claim. The CFPB compared companies that use arbitration clauses and prohibit class actions with companies that had eliminated

[4] *Ting v. AT&T*, 182 F. Supp. 2d 902 (N.D. Cal. 2002), aff'd in part, rev'd in part on other grounds, 319 F.3d 1126 (9th Cir. 2003).
[5] See, Amici Curiae brief, at 3, and *Coneff v. AT&T Corp*., 620 F.Supp. 2d 1248 (W.D. Wash. 2009).
[6] Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress 2015*, http://1.usa.gov/1EPG8nT.
[7] CFPB, *Arbitration Study Preliminary Results*, Section 4, at 81, http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.
[8] CFPB, *Arbitration Study*, Section 1: *Introduction And Executive Summary*, at 12.
[9] See, CFPB, *Arbitration Study*, Section 3 *What do consumers understand about dispute resolution systems?, at 3-4.*

forced arbitration from their consumer contracts. It found no statistically significant evidence that the companies that removed the arbitration clauses increased their prices or reduced access to credit.

These findings are applicable to telecommunications and broadband privacy claims where the losses per consumer is too-small to pursue on an individual basis, but the company – by harming thousands of its customers with the same practice – gains potentially millions of dollars in illegal profit.

In its proposed rulemaking to eliminate class action bans in forced arbitration clauses, the CFPB reached specific conclusions. It determined that based on its data, individual arbitration systems alone are inadequate mechanisms to resolve potential violations of consumer protection law that broadly apply to many or all customers of a particular company for a given product or service.[10] The CFPB also concluded that small claims can reflect significant aggregate harms when the potentially illegal practices affect many consumers, and, more generally, the market for consumer financial products and services.[11] Similarly, broadband privacy-related violations may appear as small, individual claims, but such a claim likely indicates broader harms that impact many customers of the violating provider.

The CFPB also found, based on its study and its further analysis, that class actions procedure provides an important mechanism to remedy consumer harm. The study showed that class action settlements are a more effective means through which large numbers of consumers are able to obtain monetary and injunctive relief in a single case.[12]

Importantly, the CFPB also concluded that public enforcement is not itself a sufficient means to enforce consumer protection laws and consumer finance contracts.[13] Public enforcement is critical in FCC oversight of a variety of telecommunications companies and broadband providers. Due to the breadth of broadband providers' business practices, including their conduct in protecting consumer privacy, the FCC should value private enforcement as a much-needed mechanism to provide remedies to consumers and to deter widespread corporate misconduct. Indeed, as its sister agency, the CFPB, observed, "(t)he standard economic model of deterrence holds that individuals who benefit from engaging in particular actions that violate the law will instead comply with the law when the expected cost from violation, i.e., the expected amount of the cost discounted by the probability of being subject to that cost, exceeds the expected benefit. Consistent with that

[10] Bureau of Consumer Financial Protection, *Arbitration Agreements, Proposed rule with request for public comment*. 81 Fed. Reg. 32830, 32858 (May 24, 2016).
[11] *Id*.
[12] *Id.*
[13] 81 Fed. Reg. 32830, 32860.

model, Congress and the courts have long recognized that deterrence is one of the primary objectives of class actions."[14]

The FCC is authorized to act on behalf of consumers.

The FCC has clear legal authority to limit the use of forced arbitration in broadband privacy claims under the Communications Act. Section 201 of the Act grants the FCC the authority to prescribe rules that may be necessary in the public interest to carry out the Act.[15] It also requires all practices in connection with communications service to be reasonable, and that any practice that is unjust or unreasonable is prohibited.[16] § 222 of the Act provides a duty for providers of communications services to protect both the privacy and security of information about their customers AND provides the FCC with the authority to adopt rules that are necessary to implement this obligation.[17] Finally, Congress clearly contemplated a private enforcement mechanism of violations in §§ 206 and 207.[18]

There are many examples of how the use of forced arbitration clauses is inherently unreasonable and unjust, and that prohibiting its use in this context would be in the public interest. It would also promote the principles of transparency and choice, which are key components of the § 222 framework. Including a limitation on forced arbitration clauses in contracts between BIAS providers and their customers would be in line with Congressional intent under the Act. It is therefore undoubtedly within the FCC's authority to limit the abusive practice of forced arbitration.

The FCC is not precluded from limiting forced arbitration clauses by the Federal Arbitration Act (FAA) for several reasons. The FAA simply supports the enforcement of written arbitration provisions in contracts. The "liberal policy favoring arbitration" confers only the right to have valid arbitration clauses enforced according to their terms, which is not the same as an absolute right to insert forced arbitration clauses into contracts.[19] That's because the FAA does NOT give a free-standing legal right to arbitrate.[20] While it's true that the Supreme Court has said when a statute is silent on arbitration, the FAA requires the arbitration agreement to be enforced according to its terms, in the absence of a forced arbitration clause, there are no terms to be enforced and the FAA legal analysis isn't triggered. And, what the Supreme Court has never held is that the FAA prohibits federal

[14] 81 Fed. Reg. 32830, 32862.
[15] *See e.g.* 47 U.S.C.A. § 201. Service and charges.
[16] 47 U.S.C.A. § 202. Discriminations and preferences.
[17] *See* 81 FR at 23396-7.
[18] *See* 47 U.S.C.A. § 206. Carriers' liability for damages.
[19] *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 673 (2012).
[20] See *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) ("[N]othing in the [FAA] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement"); *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474-75 (The FAA "does not confer a right to compel arbitration of any dispute at any time"); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) ("The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement-upon the motion of one of the parties-of privately negotiated arbitration agreements.").

agencies from regulating the use of forced arbitration agreements.[21] In fact, the Supreme Court has held that the FAA's policies do not preclude a federal agency from employing its delegated authority to adopt "rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights," even if that authority says nothing specific about arbitration.[22] As such, the conflict presented between the FCC's authority and the rights conferred by the FAA is a false one and FCC is within its legal authority to limit forced arbitration in broadband privacy claims.

The FCC should also be aware that many corporations include terms, known as delegation clauses, as part of their forced arbitration clauses in their customer contracts. In some cases, consumers have been able to argue in court that arbitration clauses are unconscionable and invalid, and therefore the dispute can go forward in court. However, these delegation clauses designate arbitrators to hear arguments on the validity of the arbitration clause related to the dispute.[23] These terms unfairly empower arbitrators to make decisions about whether arbitration clauses are valid, and thus whether arbitrations should proceed. At the very least, the FCC should ensure in its rulemaking that the commission will remain a forum for consumers to file complaints and seek relief for violations of their privacy rights.

Federal agencies exercise their broad authority to rein in abusive forced arbitration clauses.

As we mentioned in our submitted comment letter, other federal agencies have used and are exercising their broad authority to restore consumers' rights and to ensure accountability in the respective markets they are charged with overseeing. The FCC's actions would be consistent with actions of these agencies to protect American communities from forced arbitration.[24] Below are examples as presented in our originally submitted comments:

A) *Financial Consumers*. After it produced its comprehensive study, the CFPB determined that it would serve the protection of consumers and be in the public interest to limit forced arbitration clauses in consumer finance contracts by eliminating their worst element, class action bans.[25] Public interest groups had urged the CFPB to eliminate forced arbitration clauses outright, but have nonetheless commended it for taking a huge step forward to restore access to remedies for millions of consumers in the financial marketplace. Because the CFPB found so few consumer finance disputes were adjudicated in individual arbitration, it has decided to further collect and examine data for these individual cases to

[21] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 merely found that a state's law was preempted because it conflicted with the FAA.
[22] *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 234 (1987).
[23] *See*, *Rent-A-Center v. Jackson*, 561 US 63 (2010).
[24] See, also, attached document, *The Tide is Turning Against Forced Arbitration*.
[25] *Arbitration Agreements*, 81 Fed Reg. 32830, May 24, 2016.

determine whether further steps may be warranted to regulate forced arbitration clauses that do not ban class actions.

B) *Students*. The Department of Education has put forth proposals to protect college students from abuses of forced arbitration clauses and is likely to consider a full ban on forced arbitration.[26]

C) *Elderly Americans*. In October 2015, the Center for Medicare and Medicaid Services (CMS) issued a proposed rule to revise the requirements that Long-Term Care facilities must meet to participate in the Medicare and Medicaid programs. CMS proposed to curb long-term care facilities' use of forced arbitration by preventing them from conditioning admission on a patients' agreement to arbitration. [27]

D) *Workers*. In 2014, President Obama issued an executive order containing protections for employees of federal contractors. Included in those protections was a direction for federal contractors to stop using forced arbitration against their workers for certain claims, including sexual harassment and Title VII claims.[28]

E) *Servicemembers*. In 2015, the Department of Defense issued a rule to expand coverage of the Military Lending Act, a law that provides protections for servicemembers, including a 36-percent rate cap, for certain credit products. The law also prohibits lenders from forcing servicemembers to go to arbitration to resolve disputes arising from those products.[29]

Conclusion

The above-referenced organizations strongly support a rule that would restore consumers' ability to choose how to resolve disputes with broadband providers after disputes arise. Forced arbitration clauses too often have denied telecommunications customers of their rights and remedies when harmed by privacy violations and other misconduct. We urge the FCC to seek to restore consumers' legal rights by eliminating forced arbitration clauses in broadband provider customer contracts. At the very least, the FCC should ensure that restrictive contract provisions do not deny consumers of the ability to complain or seek relief before the commission. Further, we acknowledge and are aware of the other critical issues at stake in the broadband privacy rulemaking. If the FCC decides to limit the scope of the rulemaking related to dispute resolution, it should follow up on its previous observations about forced arbitration made in its proposed rule, and it should remain open to addressing this issue in the public's interest.

---

[26] *U.S. Department of Education Takes Further Steps to Protect Students from Predatory Higher Education Institutions*, March 11, 2016, http://1.usa.gov/1WfKxYc

[27] *Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities*, 80 Fed. Reg. 42168, July 2015.

[28] *Executive Order --Fair Pay and Safe Workplaces*, July 31, 2014, http://1.usa.gov/1SP2ytJ; *Federal Acquisition Regulations: Fair Pay and Safe Workplaces*, 80 Fed. Reg. 30548, May 28, 2015.

[29] 32 CFR Part 232.

Thank you for your time and attention to this matter.

Sincerely,

/s/ Christine Hines

Christine Hines
Legislative Director
National Association of Consumer Advocates

cc: Sherwin Siy